No. 86-368

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MILO L. RAFFAELLI, JR.,

Petitioner,

vs.

BOARD OF FIRE AND POLICE COMMISSIONERS OF THE VILLAGE OF JUSTICE, ILLINOIS, PAUL B. KELLY, ROCCO MUSCIA, and JOSEPH FRANK, Commissioners of the Board of Fire and Police Commissioners of the Village of Justice, Illinois, DEAN J. LISINSKI, Mayor of the Village of Justice, Illinois, EUGENE G. WROBLEWSKI, Chief of Police of the Village of Justice, Illinois, JERRY W. CARTER, PAUL WASIK, and LEONARD J. SUDDETH, Police Officers of the Village of Justice, Illinois, and THE VILLAGE OF JUSTICE, ILLINOIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STANLEY H. JAKALA
3219 Maple Avenue
Berwyn, Illinois 60402
(312) 788-5733

Attorney for Petitioner

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTION PRESENTED

Do state court proceedings reviewing administrative agency decisions provide full and fair opportunity to resolve constitutional violations?

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OPINIONS BELOW

On April 8, 1985, the Honorable John A. Nordberg granted a motion to dismiss the petitioner's complaint, adopting the Report and Recommendation of Magistrate

Olga Jurco which stated that the complaint was barred by the doctrine of *res judicata*. (Appendix B)

The United States Court of Appeals for the Seventh Circuit affirmed the district court in an order issued June 6, 1986. (Appendix A)

JURISDICTION

1. The Petitioner raised the federal question relative to the effect of a judgment in state court administrative review proceedings on a concurrent Section 1983 action in federal court, in the district court and in the Court of Appeals.

2. The petition for a writ of certiorari was filed within 90 days after the entry of the judgment by the United States Court of Appeals for the Seventh Circuit, Chicago, Illinois, on June 6, 1986.

FEDERAL STATUTE INVOLVED

Title 28 – United States Code

Judiciary And Judicial Procedure

Section 1738. State and Territorial statutes and judicial proceedings; full faith and credit.

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

On July 1, 1980, the Board of Fire and Police Commissioners of the Village of Justice, Illinois, posted an eligibility list for promotion to the rank of police sergeant. The Petitioner, Milo L. Raffaelli, Jr., ranked number one on the list.

On June 30, 1982, the Village Board of Trustees directed the Board of Fire and Police Commissioners to recommend three names for promotion to the rank of sergeant. The Board recommended the officers who ranked second, third, and fourth on the list, who were then promoted to the rank of temporary sergeant for a 60-day period effective September 3, 1982, and who subsequently received permanent appointments. The Petitioner, who ranked first on the list, did not receive a promotion.

On August 3, 1982, the Chief of Police filed disciplinary charges against the Petitioner alleging that he had com-

mitted a battery against a private citizen and against a fellow officer. The Board of Fire and Police Commissioners held an administrative hearing on the charges and discharged the Petitioner on October 6, 1982.

The Petitioner filed a Section 1983 action on September 3, 1982, alleging that his constitutional rights were violated in that he was deprived of his promotion and a fair and impartial hearing before the Board of Fire and Police Commissioners for political reasons and in retaliation for his cooperation with an FBI investigation which led to the Mayor's conviction on extortion charges.

At the same time, the Petitioner sought to reverse the Fire and Police Commission's finding of guilty as to the battery charges and gain reinstatement to the police department by filing a Complaint for Administrative Review in the Circuit Court of Cook County, Illinois. The state court reversed one of the battery charges and upheld the other, and remanded the matter for reconsideration of the sanction of discharge. The Board then determined that discharge was still warranted despite the reversal of one of the battery charges. This decision was then upheld by the Circuit Court judge

The Illinois Appellate Court affirmed the Circuit Court's decision that the finding that the Petitioner had committed a battery was not against the manifest weight of the evidence and upheld the Petitioner's discharge.

The Illinois Supreme Court denied leave to appeal.

While the administrative review case was pending in the Illinois Appellate Court, the district court, acting pursuant to the defendants' motion, dismissed the Section 1983 case as barred by the doctrine of *res judicata*.

The Petitioner then took a timely appeal. The Court of Appeals held that all the elements needed for the application of the doctrine of *res judicata* were present and affirmed the judgment of the district court. The decision was rendered on June 6, 1986.

REASONS FOR GRANTING THE WRIT

The administrative charges brought against the Petitioner dealt solely with the issue of whether he had committed a battery. A finding of guilty as to these charges would be sufficient under Illinois law to satisfy the "cause" requirement that must be established to discharge a civil service employee such as the Petitioner. It is clear that the Petitioner sought review of the guilty finding in the state court as he clearly desired to remain on the police force despite the alleged constitutional rights violations he suffered.

The Petitioner respectfully submits that the action taken to protect his employment should not operate to deny him redress for the constitutionally protected interests which he alleged were violated in his concurrent Section 1983 action.

The decision of the Court of Appeals denies a federal forum to a litigant with unlitigated constitutional claims that could not have been meaningfully addressed anywhere else, thereby contravening Section 1983's intent and purpose.

This Court has stated that the concepts of claim and issue preclusion cannot apply when the party against

whom the earlier judgment is asserted did not have a full and fair opportunity to litigate the issue in the earlier case. *Haring v. Prosise*, 462 U.S. 306, 313 (1983).

An analysis of the administrative and state court proceedings that were had demonstrated that the Petitioner was indeed denied such a full and fair opportunity to gain redress for his constitutional claims.

The Board of Fire and Police Commissioners only considered evidence relative to the alleged battery. In fact, in its written findings, the Board, in response to the Petitioner's objections to the hearing procedures that were followed, stated:

> We find that such procedure served to expedite the hearing proceedings, by avoiding the necessity of our having to ask the attorney's advice on all motions and objections, and permitted us to concentrate upon the evidence and testimony and not divert our attention and consideration to matters of law which we have no familiarity.

Obviously questions of constitutional and federal significance could not have been meaningfully addressed before an administrative board composed of laymen. Indeed, judging by the Board's findings, they did not consider it necessary to deal with those issues.

Similarly, the record in the Circuit Court is devoted to the issue of whether a battery was committed, as this is all that could have been decided on the record of the Board's proceedings, and all that was necessary to sustain the Petitioner's discharge. Under Illinois law, the function of the court on administrative review is merely to review the record to ascertain whether it contains some support for the findings. *See Basketfield v. Police Board*, 56 Ill.2d 351, 307 N.E.2d 371 (1974).

In fact, not only is the disinterest of the Board reflected by the above quotation, but further, the Board flatly refused to respond relative to the Petitioner's inquiry of it as to its bias or prejudice against the Petitioner for his involvement in the Mayor's criminal prosecution, said inquiry being made at the commencement of the hearing on remand of the matter from the Circuit Court of Cook County, Illinois, concerning the question of sanction.

This issue, although raised in the Circuit Court of Cook County, Illinois, and in the Appellate Court of Illinois, for the First District, was completely ignored by the state courts.

Therefore, the issue central to the federal claim could not have been addressed without the resolution of the bias and prejudice issue.

Moreover, an examination of additional factors that surrounded the proceedings that were had demonstrates that the federal issues could not have been adequately raised for several reasons. First, the almost non-existent discovery available in administrative review proceedings would have made it impossible to develop the federal issues, since "Civil Practice Act of Illinois not applicable to proceedings before administrative body", *Village of South Elgin v. Waste Management*, 64 Ill.App.3d 565, 381 N.E. 2d 778 (1978). Second, the circumstances surrounding the allegedly improper circumvention of the statutory promotional process would have been deemed irrelevant by the Board, which was only interested in and competent to decide issues surrounding the alleged battery. Finally, the Mayor's pending criminal prosecution for bribery and extortion and his resulting invocation for the privilege against self-incrimination would have prevented the Petitioner from eliciting the testimony that forms the very basis of his federal cause of action.

The case at bar is therefore distinguishable from this Court's recent holding in *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984), because that case did not involve the factors preventing the federal issues from being adequately litigated in state court that are present here. *Cf. Jones v. City of Alton*, 757 F.2d 878 (7th Cir. 1985) (police officer who sought administrative review of discharge based on shoplifting incident not barred from pursuing racial discrimination issues in federal court because Board and state court deemed those issues irrelevant to disposition of shoplifting charges).

The state court litigation turned on whether the evidence could sustain a finding that the Petitioner committed a battery. As previously noted, much of the evidence needed to prevail under Section 1983 could not have even been considered at that level. At most there is some factual overlap in the litigation. Given this, the Petitioner respectfully submits that he could not be expected to adequately pursue, through a Board of Fire and Police Commissioners with state court review of their findings, a remedy for his alleged constitutional deprivations. Therefore, the equitable doctrine of *res judicata* should not be used to deny the Petitioner his day in court, thereby vitiating the purposes of 42 U.S.C. § 1983.

CONCLUSION

For the reasons enumerated herein, this petition should be granted.

Respectfully submitted,

STANLEY H. JAKALA
3219 Maple Avenue
Berwyn, Illinois 60402
(312) 788-5733
Attorney for Petitioner

APPENDIX A

[UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 35]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued March 4, 1986
June 6, 1986

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*

MILO L. RAFFAELLI, JR.,

Plaintiff-Appellant,

No. 85-1771 v.

BOARD OF FIRE AND POLICE COMMISSIONERS OF THE VILLAGE OF JUSTICE, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82 C 5480—**John A. Nordberg,** *Judge.*

ORDER

Appellant, Milo Raffaelli, a former patrolman of the Village of Justice, Illinois, filed this § 1983 action challenging the decision of the Board of Fire and Police Commissioners of the Village of Justice, Illinois not to promote him to sergeant and to terminate his employment as a patrolman. The district court adopted the recommendations of the magistrate and dismissed the complaint as barred by the doctrine of *res judicata*. We affirm.

On June 30, 1982, the Village Board of Trustees directed the Board of Fire and Police Commissioners (the "Board") to recommend from an eligibility list three names for promotion to the rank of sergeant. The Board recommended the police officers who ranked second, third, and fourth on an eligibility list. These officers were promoted to the rank of temporary sergeant for a sixty-day period effective September 3, 1982, and subsequently received permanent appointments. Raffaelli, who ranked first on the eligibility list, did not receive a promotion. Instead, on August 3, 1982, the Chief of Police filed disciplinary charges against Raffaelli alleging that he had physically attacked both a private citizen and a fellow police officer. The Board held a hearing on the charges on September 9, 1982. Plaintiff was suspended on the date of the hearing, and pursuant to the Board's findings, was discharged on October 6, 1982.

Plaintiff, who had filed this § 1983 action on September 3, 1982, appealed the Board's decision by filing a complaint for Administrative Review in the Circuit Court of Cook County. On October 6, 1983, the Circuit Court entered an order reversing one charge of aggravated battery, upholding the other charge of battery, and remanding to the Board for it to reconsider the appropriate punishment. Subsequent to the state court's decision, the district court, acting pursuant to the defendant's motion, dismissed the case as barred by the doctrine of *res judicata*.

It is settled law that a state court judgment must be given the same *res judicata* effect in federal court that

it would be given in the courts of the rendering state. *Jones v. City of Alton*, 757 F.2d 878, 883 (7th Cir. 1985) (citing *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984); *Mandarino v. Pollard*, 718 F.2d 845, 848 (7th Cir. 1983), *cert. denied*, 105 S. Ct. 116 (1984)). This rule applies to § 1983 actions with respect to issues actually litigated (issue preclusion), *id.* (citing *Allen v. McCurry*, 449 U.S. 90 (1980)), and also issues which could have been but were not litigated in the state court proceedings (claim preclusion). *Id.* (citing *Lee v. City of Peoria*, 685 F.2d 196, 198-99 (7th Cir. 1982)). A limitation to the application of claim and issue preclusion is that they will not apply unless the party against whom they are asserted had, in compliance with the Due Process Clause of the Fourteenth Amendment, a full and fair opportunity to litigate the issue in the earlier case. *Id.* at 884. For example, in *Jones* the Court held that a fired police officer was not barred by *res judicata* because neither the administrative tribunal nor judicial tribunal would consider his discrimination claim. *Id.* at 887.

This case, however, does not present a fact situation comparable to that in *Jones*. Rather, it is very similar to *Lee v. City of Peoria*, 685 F.2d 196 (7th Cir. 1982). As in *Lee*, all three elements for application of the *res judicata* doctrine are present. There is (1) a final judgment on the merits in an earlier action, (2) an identity of the cause of action in both the earlier and later suit and (3) an identity of parties or their privies in the two suits. *Id.* at 199.

On appeal, Raffaelli initially argues that there was no judgment on the merits of what he contends was a First Amendment violation. This argument is without merit. Raffaelli clearly received a final judgment on the merits by the state court. His assertion that the state proceedings "could not dispose of a First Amendment violation" is wrong because there is no indication that the state tribunals were unwilling to consider it and even if they were unwilling to consider it, there is no indication that Raffaelli made the necessary attempt to raise the issue.

Compare Jones v. City of Alton, 757 F.2d at 885 (state review proceedings declined to consider racial discrimination claim raised by plaintiff).

Similarly, Raffaelli argues that his state and federal suits are not the same causes of action because his First Amendment claim could not have been raised in the administrative proceedings. This is also incorrect. "A cause of action consists of single core of operative facts which give the plaintiff a right to seek redress for the wrong concerned. Even though one group of facts may give rise to different claims for relief upon different theories of recovery, there remains a single cause of action. If the same facts are essential to the maintenance of both proceedings or the same evidence is needed to sustain both, then there is identity between the allegedly different causes of action asserted, and *res judicata* bars the latter [action]." *Lee*, 685 F.2d at 200 (quoting *Morris v. Union Oil Co. of California*, 96 Ill. App. 3d 148, 421 N.E.2d 278 (1981)). Despite appellant's various arguments to the contrary, this case, under the above test, is the same cause of action as that asserted in state court. The fact that he failed to raise his First Amendment claim in the state proceedings is irrelevant in determining whether identical causes of action exist.

Finally, Raffaelli contends that there is no identity of parties because the Mayor of the Village of Justice, one of the defendants in this action, did not file an appearance during the administrative review proceeding. This argument is also without merit. As appellee correctly points out, appellant has failed to cite any case that could overcome this Court's holding in *Mandarino v. Pollard*, 718 F.2d 845 (7th Cir. 1983), that a government and its officers are in privity for the purpose of *res judicata*.

In summary, because it is clear that all three elements for application of the doctrine of *res judicata* are present, we affirm the judgment of the district court.

APPENDIX B

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

RAFFAELLI, MILO

v.

BOARD OF FIRE AND POLICE COMMISSIONERS

No. 82 C 5480 — **John A. Nordberg,** *Judge*

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Court hereby overrules the plaintiff's objections and adopts the report and recommendation of the magistrate. Accordingly defendants' motion to dismiss is granted.

Clerk: H. STUART CUNNINGHAM
(By) (signed) Deputy Clerk

Date: 4/8/85

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 82 C 5480 Date: April 8, 1985

Name of Assigned Judge: John A. Nordberg

Case Title: Raffaelli v. Board of Fire and Police Commissioners

* * * * *

DOCKET ENTRY:

Judgment is entered as follows: The court has carefully considered the Report and Recommendation of the Magistrate, and all the pleadings in the case, including the plaintiff's objections to the Magistrate's Report. The court hereby overrules the plaintiff's objections, and adopts the Report and Recommendation of the Magistrate. Accordingly, defendants' motion to dismiss is granted.

* * * * *

FILED: April 8, 1985.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MILO L. RAFFAELLI, JR.,

Plaintiff,

v. 82 C 5480

BOARD OF FIRE AND POLICE COMMISSIONERS OF THE VILLAGE OF JUSTICE, et al.,

Defendants.

To: The HONORABLE JOHN A. NORDBERG, Judge,
United States District Court

REPORT AND RECOMMENDATIONS OF MAGISTRATE OLGA JURCO

This is an action brought by a former patrolman of the Village of Justice pursuant to 42 U.S.C. §1983 and 42 U.S.C. §1985 alleging that his failure to be promoted to the rank of sergeant and subsequent termination as a police officer violated his rights under the First and Fourteenth Amendments of the United States Constitution. Plaintiff further alleges a conspiracy among the defendants to abridge plaintiff's statutory and constitutional rights. The defendants herein are the Village of Justice, the Board of Fire & Police Commissioners (the "Board"), the individual Commissioners on the Board, the Mayor and Police Chief of the Village, and three individual police officers promoted to the rank of sergeant and joined as interested parties. The defendants have all filed motions to dismiss plaintiff's complaint.

I. *Factual Background*

On July 1, 1980, the Board posted a final eligibility list for promotion to the rank of sergeant which list expired June 30, 1983. Plaintiff was listed as number one thereon. On June 30, 1982, the Village Board of Trustees directed the Board of Fire and Police Commissioners to recommend from the eligibility list three names for promotion to the rank of sergeant.[1] Thereafter, the Board held a special meeting on July 26, 1982, at which time defendant police officers Suddeth, Carter, and Wasik, ranked fourth, third, and second on the eligibility list, respectively, were promoted to the rank of temporary sergeant pursuant to Ill.Rev.Stat. ch. 24, §10-2.1-16[2] for a sixty-day period effective September 3, 1982, and subsequently were appointed permanent sergeants.

On September 9, 1982, plaintiff was suspended from the force, and a hearing was held that date[3] before the Board

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[1] The Village is governed by the Illinois Municipal Code, Ill.Rev. Stat. ch. 24, §10-2.1, *et seq.* Section 10-2.1-15 entitled "Promotions—Merit—Seniority" provides in pertinent part as follows:

> The board, by its rules, shall provide for promotion in the fire and police departments on the basis of ascertained merit and seniority in service and examination, and shall provide in all cases, where it is practicable, that vacancies shall be filled by promotion. . . . All promotions shall be made from the 3 having the highest rating, and where there are less then 3 names on the promotional eligible register, as originally posted, or remaining thereon after appointments have been made therefrom, ...

[2] Section 10-2.1-16 provides in relevant part as follows:

> In order to prevent a stoppage of public business, to meet extraordinary exigencies, or to prevent material impairment of either the police or fire department, the board may make temporary appointments, to remain in force until regular appointments may be made under the provisions of this Division 2.1, but never to exceed 60 days. . . .

[3] According to the Board's findings, the hearing was not concluded that date but was continued from time to time thereafter and held on September 15, 20, 24, and 27, 1982.

in connection with disciplinary charges filed by the Chief of Police on August 3, 1982 alleging plaintiff's violation of certain disciplinary rules and regulations of the Village police department. The charges stemmed from plaintiff's alleged commission of a battery on a private citizen and an aggravated battery on another police officer on July 22, 1982. Pursuant to the Board's findings, plaintiff was discharged as a patrolman for the Village on October 9, 1982.

Between the time of the temporary appointments in July and his termination, plaintiff initiated this federal civil rights suit. Thereafter, plaintiff appealed the Board's termination action by way of Complaint for Administrative Review in the Circuit Court of Cook County, Illinois.[4] The gist of plaintiff's administrative review complaint[5] is that the Board's decision was contrary to the law and the facts of the case, that the Board was prejudiced against him as evidenced, *inter alia*, by a copy of plaintiff's federal civil rights complaint, and that he was denied a fair and impartial hearing in violation of his due process rights under the Fifth and Fourteenth Amendments of the United States Constitution. On October 6, 1983, the Circuit Court entered an order reversing one charge of aggravated battery, sustaining the other charge of battery, and remanding the case to the Board for reconsideration as to punishment.

Plaintiff now seeks in this federal action a judgment vacating the permanent sergeant appointments and directing the Board to promote from the three highest ranked police officers from the above-referenced list, thereby ap-

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[4] Section 10-2.1-17 of the Illinois Municipal Code provides, *inter alia*, that the provisions of the Administrative Review Act [Ill. Rev.Stat. ch. 110, §3-101, *et seq.* (1983)] "shall apply to and govern all proceedings for the judicial review of final administrative decisions of the board of fire and police commissioners".

[5] A copy of this complaint was attached for the court's reference to the Board's Reply to Plaintif's Memorandum in Opposition to Defendants' Motion to Dismiss.

pointing plaintiff. Plaintiff further seeks compensatory and punitive damages for defendants' violation of his First and Fourteenth Amendment rights. According to plaintiff's allegations, all of the defendants, other than the three individual police officers, entered into "an explicit or implied agreement or understanding and acted in concert in effectuating their agreement or understanding of depriving plaintiff of a sergeant's promotion and of arranging plaintiff's termination of employment." (Plaintiff's Second Amended Complaint, ¶12). This agreement or understanding was manifested, according to plaintiff, as follows:

(1) The July 26, 1982 special meeting of the Board was not published as required by the Illinois Open Meetings Act, Ill.Rev.Stat. ch. 102, §41 *et seq.*;
(2) Defendants' characterization of the sergeant promotions on July 26, 1982 as temporary was intended to circumvent the statutory promotional scheme providing for permanent promotions based upon the rule of three;
(3) The temporary sergeants were sworn and issued sergeant's badges and commission cards prior to September 3, 1982, the effective date of the appointments;
(4) The three individual members of the Board (as well as the Mayor and Chief of Police) belonged to the United Citizens Party of Justice, Illinois contrary to Ill.Rev. Stat. ch. 24, §10-2.1-3[6] while plaintiff was a member of the Victory Party of Justice;
(5) The Mayor knew plaintiff had cooperated with the FBI in an investigation culminating in the Mayor's criminal trial for bribery and extortion in connection with a suburban restaurant's liquor license; tape recordings entered into evidence during the trial "substantiated that [the Mayor] determined a Village policy to termi-

[6] Section 10-2.1-3 provides in relevant part that "[n]o more than 2 members of the board shall belong to the same political party existing in such municipality at the time of such appointments . . . If only one or no political party exists in such municipality at the time of such appointments, then state or national political party affiliations shall be considered in making such appointments."

nate the employment of the Plaintiff in that the Plaintiff was 'too honest a cop and would not play ball'." (Plaintiff's Second Amended Complaint ¶24)

(6) On December 29, 1982, the Mayor and Board entered into a lawsuit in the Circuit Court of Cook County in connection with the sergeant's promotional examination wherein the Circuit Court held that the examination was not invalid despite the Board's failure to promulgate its rules and regulations prior thereto, and set aside the method of awarding seniority points without affecting the validity of the subject eligibility list; plaintiff contends that the defendants sanctioned and approved the litigation in order to circumvent plaintiff's right to a promotion pursuant to Ill.Rev.Stat. ch. 24, §10-2.1-15.

Plaintiff alleges that the Defendants through the conduct enumerated above, intentionally, maliciously, and with reckless disregard of his constitutional rights sought the following: to deprive plaintiff of his right to a promotion and to a fair and impartial hearing before the Board for political reasons or, alternatively, in retaliation for his involvement in the Mayor's criminal prosecution; to deprive plaintiff of a proprietary right and liberty interest without due process of law by failing to promote him and by terminating him without cause; and to deny plaintiff the equal protection of the law by denying him his statutory right to a promotion and a fair and impartial discharge hearing.

II. *Motion to Dismiss of Defendants Board and Individual Commissioners*

The thrust of the motion to dismiss of the Board and individual Commissioners is that the principles of res judicata as most recently articulated in *Lee v. City of Peoria*, 685 F.2d 192 (7th Cir. 1982) clearly mandate dismissal of

Plaintiff's Second Amended Complaint.[7] Defendants contend that the issues of the Board's prejudice against plaintiff and whether plaintiff received a fair and impartial hearing were matters considered by the Circuit Court in its disposition of plaintiff's complaint on administrative review thereby barring relitigation of these isues in this civil rights action. Defendants further argue that plaintiff's termination was part of the chain of events comprising the conspiracy of which he now complains and therefore the conspiracy issue could have been raised in the prior proceeding barring it from further consideration in this forum.

Two branches of estoppel are applied both in Illinois and in the federal jurisprudence to bar the maintenance of a cause of action:

> The term *res judicata* is applied to the more sweeping doctrine which prohibits the relitigation of claims and issues that were raised or could have been raised by a prior action between the same parties or their privies which has been resolved by final judgment on the merits by a court of competent jurisdiction. This branch has been referred to as "claim preclusion" based on its broad effect. *Collateral estoppel*, or "issue preclusion," stands for the doctrine which forecloses the relitigation of particular issues of either

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[7] In the case at bar, Defendants have raised the defense of res judicata in the form of a Rule 12(b)(6) motion. Although res judicata is not a defense under Fed.R.Civ.Pro. 12(b) but rather an affirmative defense that should be raised under Fed.R.Civ.Proc. 8(c), a party may raise a res judicata defense by motion rather than by answer where the defense's existence can be judged on the face of the complaint. *Florasynth Laboratories, Inc. v. Goldberg*, 191 F.2d 877 (7th Cir. 1951). Although defendants have failed to place on the record the Circuit Court order disposing of plaintiff's administrative review complaint, plaintiff's complaint herein acknowledges that his action in the circuit court resulted in sustaining one charge of battery and this court has the ability to take judicial notice of the circuit court judgment. *Barrett v. Baylor*, 457 F.2d 119 (7th Cir. 1972).

> fact or law that are logically and legally necessary in reaching the prior judgment where such issues are again raised by at least one of the parties to the prior suit. The preclusion remains despite the fact that a different cause of action is pleaded in the subsequent proceedings. (citations omitted)

Morris v. Union Oil Co. of California, 96 Ill.App.3d 148, 153, 51 Ill.Dec. 770, 421 N.E.2d 278 (1981). The crucial distinction between the preclusive effect of res judicata and collateral estoppel is the fact that res judicata bars not only those issues actually decided in the prior action but also any issues which could have been raised. *Hagee v. City of Evanston*, 729 F.2d 510, 512 (7th Cir. 1984); *Gasbarra v. Park-Ohio Industries, Inc.*, 655 F.2d 119, 121 (7th Cir. 1981).

The principles of res judicata and collateral estoppel are embodied in 28 U.S.C. §1738 which reads in relevant part:

> [J]udicial proceedings shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State . . . from which they are taken.

It is now a well-established rule that Section 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged. *See Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982); *Allen v. McCurry*, 449 U.S. 90, 96, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). Recent cases have also clarified that the principles of res judicata and collateral estoppel are to be applied to claims arising under the civil rights laws and the United States Constitution. *See, e.g., Hagee v. City of Evanston, supra*, (action brought under 42 U.S.C. §1983). In particular, the Supreme Court in *Migra v. Warren City School District Board of Education*, ____ U.S. ____, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984) addressed the issue of the preclusive effect of a state court judgment in the context

of a subsequent suit in federal court under 42 U.S.C. §1983 and §1985. The petitioner therein asserted that the state-court judgment should not preclude her suit in federal court simply because her §1983 claim could have been litigated in the state court proceeding and urged the Court to accord state court judgments preclusive effect in §1983 suits only as to issues actually litigated in the state court. The Supreme Court rejected this argument opining that Section 1738 "embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims." 79 L.Ed.2d at 64. The Court therefore held that the state-court judgment in *Migra* had the same preclusive effect in federal court that it would have in the courts of the rendering state.

The court in *Lee v. City of Peoria, supra,* concisely set forth the essential elements of the doctrine of res judicata to be: "(1) a final judgment on the merits in an earlier action; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of parties or their privies in the two suits." *Id.* at 199. Under Illinois law, only a final order is res judicata for subsequent litigation.[8] *Harl v. City of LaSalle,* 679 F.2d 123 (7th Cir. 1982). The definition of a judgment on the merits for purposes of res judicata is one based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction or form; traditionally, a judgment is on the merits if it completely disposes of the underlying cause of action or determines that the plaintiff has no cause of action. *Harper Plastics v. Amoco Chemicals Corp.,* 657 F.2d 939, 943 (7th Cir. 1981).

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[8] Although this federal suit was filed prior to the state court administrative review complaint, the state court judgment preceded the disposition of this federal suit. As between two actions pending at the same time, the first of two judgments has a preclusive effect on the second. *Unger v. Consolidated Foods Corporation,* 693 F.2d 703 (7th Cir. 1982).

The case at bar was litigated from the Board to the Circuit Court of Cook County, Illinois which entered an order reversing one charge of battery and sustaining the other.[9] An Illinois court has a duty under the Administrative Review Act to ensure that due process and an impartial adjudication were afforded in the administrative hearing. *Reich v. City of Freeport*, 527 F.2d 666, 671 (7th Cir. 1975). When a proceeding involves the removal of a police officer, the court's function is to decide whether the charges against the officer are not so trivial as to be unreasonable or arbitrary, whether the board acted on evidence fairly tending to sustain the charges, and whether the board's decision is related to the requirements of the service. *DeGrazio v. Civil Service*, 31 Ill.2d 482, 489, 202 N.E.2d 522 (1964). It is clear that the Circuit Court's order sustaining one charge of battery was a final judgment on the merits of plaintiff's termination and necessarily the issue of whether the hearing was in accordance with due process. The first prerequisite for res judicata in this action is therefore satisfied.

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[9] Plaintiff's Second Amended Complaint at Paragraph 16 states that the Circuit Court remanded the sustained charge to the Board "for reconsideration as to punishment." In the absence of any indication in the record that plaintiff's discharge was ever reversed by the Board on remand, and considering the fact that plaintiff in his Memorandum in Opposition does not contest the statement in Defendants' Motion to Dismiss at Paragraph 5 that "the termination of the plaintiff as an officer of the Village has already been upheld by the Circuit Court of Cook County after the plaintiff's appeal to that Court", the Circuit Court's order is considered a final order on the merits. Plaintiff also ambiguously states at page 8 in his Memorandum in Opposition that "the matter of his discharge . . . is still under appeal. . . . Therefore, the court may still hold his discharge invalid and order reinstatement of the plaintiff." Even if an appeal were in fact pending from the Circuit Court order, the operation of an otherwise final judgment as res judicata would not be suspended to preclude another action between the same parties on the same cause of action until such time as the order were vacated, reversed or modified on appeal. *In re Trans Ocean Tender Offer Securities Litigation*, 427 F.Supp. 1211 (N.D. Ill. 1977); *Sixty-Third & Halsted Realty Co. v. Goldblatt Bros.*, 342 Ill.App. 389, *aff'd* 410 Ill. 468 (1951).

As to the element of identity of parties, the defendants in the Circuit Court action were the Board, two of the individual Commissioners, and the Chief of Police. In the federal suit, plaintiff has added the third Commissioner (who recused himself from the discharge hearing pursuant to plaintiff's Motion to Recuse), the Mayor, the Village and the three promoted police officers (as interested parties). The only defendants now asserting the doctrine of res judicata, however, are the Board and the individual Commissioners. Members of the board of fire and police commissioners are considered officers of the municipality pursuant to Ill.Rev.Stat. ch. 24, §10-2.1-3. Since a government and its officers are in privity for purposes of res judicata, *Mandarino v. Pollard*, 718 F.2d 845 (1983), the one additional Commissioner added in the federal suit is in privity with the state court defendants and the second requirement for operation of res judicata is also satisfied.

The third prerequisite for application of res judicata, whether the cause of action asserted in the second suit is the same cause of action as that asserted in the prior suit, is the crucial question in deciding most res judicata issues. *Local 1006, A.F.S.C.M.E., AFL-CIO v. Wurf*, 558 F.Supp. 230, 237 (N.D. Ill. 1982). The standard for determining what constitutes a cause of action for applying the Illinois law of res judicata has been articulated in *Lee v. City of Peoria, supra*, as follows:

> [A] cause of action consists of a single core of operative facts which give the plaintiff a right to seek redress for the wrong concerned. Even though one group of facts may give rise to different claims for relief upon different theories of recovery, there remains a single cause of action. If the same facts are essential to the maintenance of both proceedings or the same evidence is needed to sustain both, then there is identity between the allegedly different causes of action asserted, and *res judicata* bars the latter action. (citing *Morris v. Union Oil Co. of California, supra*).

Id. at 200.[10] The court in *Harper Plastics v. Amoco Chemicals Corp., supra,* observed that although the primary test for determining if two suits are based on the same cause of action is whether both suits arise out of the same basic factual situation, a transaction or occurrence can give rise to several causes of action; therefore, the courts have also looked to whether the judgment in a second suit would impair rights established under the first judgment. *Id.* at 944.

Recent decisions demonstrate how this test and the doctrine of res judicata have been applied in similar factual situations. In *Lee v. City of Peoria, supra,* the plaintiff police officer was discharged for previously giving false testimony before the board of fire and police commissioners. Plaintiff filed a complaint for administrative review of the Board's decision in the Circuit Court of Peoria County, Illinois, claiming, *inter alia,* that the discharge was the result of racial discrimination on the part of the city and the board and was otherwise in violation of due process. The circuit court sustained the Board's decision and plaintiff thereafter filed a federal civil rights suit which the district court dismissed stating that the single issue of fact, whether or not plaintiff's discharge was racially motivated, was common to both proceedings

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[10] In *Hagee v. City of Evanston,* 729 F.2d 510 (7th Cir. 1984), the Court of Appeals identified two approaches which the Illinois Appellate Courts have utilized in deciding whether two suits involve the same cause of action, the application of which can lead to different results. Under the "proof" approach, the standard cited is whether the same evidence would sustain both actions, while under the "transactional" approach, the court focuses on the factual setting in which each suit arises, i.e., whether a single group of operative facts give rise to the assertion of relief. The definition in *Lee* incorporates both approaches. The Court of Appeals in *Hagee* noted that the Illinois Supreme Court has not explicitly adopted one approach over the other so that the approach mandated under Illinois law is not immediately discernible. The present trend among courts nationwide is said to be the transactional approach. *Id.* n.5.

and not a separate and distinct cause of action. The Court of Appeals affirmed on the principle of res judicata stating that the state proceedings and civil rights suit arose from the same set of operative facts and the validity of Lee's discharge was crucial to each. The court stated that if the state court had deemed it necessary to obtain more evidence on Lee's claims against the Board, it had the power to remand the case to the agency for further evidence. The procedures and avenue of review available to Lee afforded him the opportunity to fully and fairly litigate his claims. The court observed that if in fact Lee had been discharged solely because of racial discrimination he was not in fact or in law discharged because of the false testimony, and despite Lee's assertions to the contrary, the state circuit court had jurisdiction to review these allegations. Finally, if Lee were successful in establishing that he was discharged based on his race, it would directly undermine the validity of the state court decision and the city's right to discharge Lee which that decision established.

Reich v. City of Freeport, 527 F.2d 666 (7th Cir. 1975) similarly involved a former police officer whose discharge was affirmed by the circuit court on administrative review. Plaintiff's subsequent federal civil rights action alleged that his discharge resulted from the board's prejudice against him in violation of due process and sought a declaratory judgment nullifying the Board's decision and reinstating plaintiff with back pay. The Court of Appeals, in affirming the district court's dismissal of plaintiff's complaint, stated that plaintiff's federal constitutional claims were unreservedly placed in issue before the Illinois court and he was given a fair opportunity to litigate his claims in that court. Since the state court had ruled upon these claims, plaintiff could not now ask the federal court to reexamine the merits of the state court's determination. Plaintiff attempted to avoid any estoppel effect by arguing that the state courts were unable to consider these constitutional objections because of certain limitations in the Illinois Administrative Review Act and the state

courts' lack of jurisdiction. However, the court observed that Illinois law is clear that the state court did in fact have the power to consider the constitutional claims which appeared in the administrative record and that the scope of review under the Act extends to all questions of law and of fact presented by the entire record before the court.

As noted, *supra*, a federal court is required to apply the Illinois law of res judicata under Section 1738. The Illinois Supreme Court has summarized the scope of the doctrine as follows:

> [T]he conclusiveness of the judgment in such case [the prior action] extends not only to matters actually determined, but also to other matters which could properly have been raised and determined therein. *This rule applies to every question relevant to and falling within the purview of the original action*, in respect to matters of both claim [sic] or grounds of recovery, and defense, which could have been presented by the exercise of due diligence. (emphasis added)

Hagee v. City of Evanston, supra, at 514 (citing *Hughey v. Industrial Commission*, 76 Ill.2d at 582, 31 Ill.Dec. at 789, 394 N.E.2d at 1166 (1979)). The court in *Hagee* goes on to state that "[t]he principle that res judicata extends to all matters within the purview of the original action, whether or not actually raised, is tantamount to a rule requiring parties to consolidate all closely related matters into one suit," thereby serving the interest of judicial economy which is at the core of the doctrine. *Id.* Two corollaries of this rule are that a party may not maintain two suits based on the same set of facts by the simple expediency of limiting the theories of recovery advanced in the first suit, and that a party may not maintain two suits based on the same set of facts simply by altering the claim for relief from one suit to the next. *Id.* Thus, in *Hagee*, although the first suit was for injunctive relief based on a theory of estoppel while the second suit sought damages based on several constitution theories flowing

from the same conduct—the obstruction of appellant's construction project—the court held that both suits arose from the same set of facts rendering the different requests for relief and legal theories insufficient to distinguish the suits so as to defeat the application of res judicata to bar the second suit. Significantly, the court stated that the constitutional claims and request for damages were matters within the purview of the first suit and no reason existed whereby those matters could not have been raised therein.

Applying the foregoing to the case at bar, it is apparent that the operative facts underlying plaintiff's state court action consisted of his termination as a police officer and the circumstances surrounding that termination one of which was the failure of the Board to promote him. The same wrong for which redress is sought, the Board's conspiracy to deprive him of his constitutional and statutory rights, is the same in both actions.[11] The addition of new

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[11] It could be argued that the Board's alleged conspiracy resulted in two wrongs against plaintiffs: wrongful termination, which cause of action is clearly barred by res judicata, and a wrongful denial of promotion. However, the conspiracy allegations all support the wrongful termination cause of action and are required to be raised in the state court suit. The federal cause of action remaining would consequently consist of the denial of an alleged property right or liberty interest without due process of law. Whether plaintiff's due process claim would then be cognizable depends upon whether he has a right or justifiable expectation based on state law or practice. However, Illinois law is clear that a police officer has no vested right to a promotion solely because his name is on a promotion list. *McCoy v. Bd. of Fire & Police Comm'rs*, 79 Ill.App.3d 742, 398 N.E.2d 1020, 35 Ill.Dec. 70 (1st Dist. 1979); *Brunke v. Bd. of Fire & Police Comm'rs*, 99 Ill.App.3d 25, 425 N.E.2d 15, 54 Ill.Dec. 503 (1st Dist. 1981). Moreover, a plaintiff's alleged right merely to have a state statute obeyed is not a federal right protected by §1983 or the United States Constitution. *Saunders v. Cahill*, 359 F.Supp. 79 (1973). In the absence of a promulgation and communication to the plaintiff of a police department's policy of promoting only the highest ranked candidates on an eligibility list, a court cannot conclude that a due process property interest was established, *Hermes v. Hein*, 742 F.2d 350 (7th Cir. 1984),

(Footnote continued on following page)

factual allegations will not create a new cause of action for the same injury nor is plaintiff's cause of action bounded by the legal theory on which he relies in each suit. A perusal of the factual allegations in both complaints discloses that the allegations in the state court suit would support the federal court action and the allegations now under consideration, particularly the contention that a Village policy existed to terminate the plaintiff, would have supported the state court complaint for administrative review. Additionally, the factual allegations in the federal suit, with the exception of the lawsuit involving the validity of the sergeant's eligibility list[12], were all avail-

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[11] *continued*
although attaching unreasonable and arbitrary requirements for promotion is violative of due process, *DiIulio v. Board of Fire and Police Com'rs*, 682 F.2d 666 (7th Cir. 1982), *cert. den.* 459 U.S. 1038, 103 S.Ct. 451 (1982).

The record herein discloses that defendants made the temporary appointments pursuant to Ill.Rev.Stat. ch. 24, §10-2.1-16 which does not mandate a promotional scheme based on a rule of three. In addition, a perusal of the record indicates that the Board's procedure in making the temporary appointments which were to take effect in September of 1982 was arguably consistent with protecting plaintiff's proprietary interest, if any, in a promotion, by deferring the permanent sergeant appointments until after plaintiff was extended the right to a discharge hearing. The hearing in fact was concluded before the permanent appointments were made effective making it apparent that if plaintiff had not been discharged, there was a possibility he could have been promoted upon the expiration of the temporary promotions. Finally, the record reflects the existence of the battery charges against plaintiff at the time of the temporary promotions of the police officers ranked 2, 3, and 4 on the eligibility list (whose political affiliations are not set forth in the record), demonstrating the lack of an arbitrary and capricious scheme of promotion and the existence of probable good cause to bypass plaintiff, which subsequent events substantiated. Therefore, taking plaintiff's allegations as true, this cause of action would fail to state a claim upon which relief could be granted.

[12] It should be noted that the Board violated no law or regulation when it sought and received a legal opinion with respect to the validity of the eligibility list. This fact does not support any inference that defendants engaged in impermissible actions violative of due process.

able to plaintiff at the time he initiated his state court action. *Cf., Wozniak v. County of DuPage*, 569 F.Supp. 813 (N.D. Ill. 1983). This federal action amounts to a rephrasing of the challenge made in the first action that plaintiff was denied due process of law, and the issue of wrongful termination is material and relevant to both suits. The issue of wrongful denial of promotion was within the purview of the state court suit and implicit in the charges of a conspiracy against him. The relief plaintiff now requests in this federal suit, that he be promoted and the prior promotions be vacated, necessarily requires reversal of his discharge as upheld by the circuit court which would directly undermine the validity of the state decision and the Board's right to discharge plaintiff which that decision established.

No decision may constitute res judicata or collateral estoppel if the party against whom it is asserted has not had a full and fair opportunity to litigate his claims. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 480-81, 102 S.Ct. 1883, 1887, 72 L.Ed.2d 262 (1982). However, as indicated by the case law discussed, *supra*, the procedures and avenues of review available to the plaintiff herein afforded him such an opportunity. In addition, he clearly could have raised the due process conspiracy claim before the state court and his request for damages flowing therefrom *Local 1006, A.F.S.C.M.E., AFL-CIO v. Wurf, supra*, and in fact plaintiff did place his federal constitutional claims, as well as the allegation that he was deprived of a promotion, before the Illinois court by attaching a copy of his federal civil rights complaint to the prior complaint making it a part thereof. His charges of constitutional and statutory violations therefore appeared in the administrative record, the state court had jurisdiction to review these allegations, and if the court had deemed it necessary to obtain more evidence on plaintiff's claims against the Board, it had the power to remand the case to the board for further evidence pursuant to Ill.Rev. Stat. ch. 110, §3-111(a)(7). Plaintiff herein is taking his "second bite" from the posture of a litigant unable to accept the fact of his initial loss. All three elements of res

judicata having been established, plaintiff is barred from relitigating not only the issues actually decided in the state court action but all other issues that could have been decided in that action.

IV. *Conclusion*

It is recommended that the Motion of the Defendant Board and individual Commissioners to Dismiss plaintiff's complaint be granted. Although the remaining defendants have not asserted the bar of res judicata, the disposition of the Board's Motion to Dismiss pursuant to the doctrine of res judicata is equally applicable to the remaining defendants. Therefore, it is further recommended that the remaining defendants' motions to dismiss plaintiff's complaint for failure to state a claim be granted.

Parties are given ten (10) days from date hereof, unless otherwise ordered by the court, to file exceptions to said Report and Recommendations with the Honorable John A. Nordberg.

Respectfully submitted,

/s/ OLGA JURCO
United States Magistrate

March 6, 1985

Attachments:
Briefs of the Parties

cc: Stanley H. Jakala
3219 Maple Avenue
Berwyn, Illinois 60402

Robert F. Peck
Johnson & Peck
1023 West Burlington
Western Springs, Illinois 60558